Insights & Analyses

Causes of Reflection on the Use of AI in Civil Justice

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Abstract

Paper focused on two particularly relevant profiles. The first focus is the relationship between the use of artificial intelligence (AI) in the process and the protection of personal data as referred to in the European Union General Data Protection Regulation (GDPR). Predictive justice is a kind of justice foreseen by algorithms that carry out calculations starting from large masses of data (big data), to find recurrences to forecast outcomes and distinguish systems of evidence. The second focus relates to the use of constitutional principles to give reasons for sentences, in compliance with the more general principle of the human in command which gave inspiration to Art 22 GDPR and the Artificial Intelligence Act. The paper highlights, in particular, the reasoning or motivation behind judicial civil sentences. It will deepen the considerable methodological expedients that are required to respect some of the principles of the Italian Constitution while using AI, so that due process remains under human control.

I. Introduction

In 1963 the American jurist Reed C. Lawlor wrote

> 'There will come a day when man will be able to insert a set of data into a machine that has precedents, rules of law and rules of reasoning inside and in which the machine will be able to offer the reasoning step by step through which one may be able to arrive at a decision. We will be able to study it and decide whether the machine has proposed something right or wrong'.[1]

Today, that day has arrived.[2]

In 2018 (3 December), in Strasbourg, the CEPEJ (European Commission for the Efficiency of Justice) deemed it appropriate to draft the 'European Ethical Charter on the use of Artificial Intelligence in judicial systems and related areas'. It defines artificial intelligence (AI) in judicial systems as the

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[1] R.C. Lawlor, 'What Computers Can Do: Analysis and Prediction of Judicial Decisions' 49 *American Bar Association Journal,* 337 (1963).

[2] Think that day is currently still far away: M. Libertini et al, 'Giustizia predittiva e giurisdizione civile. Primi appunti', in A. Pajno et al eds, *Intelligenza artificiale e diritto: una rivoluzione?* (Bologna: il Mulino, 2022), 515.

'set of scientific methods, theories and techniques aimed at reproducing the cognitive abilities of human beings through machines'.

To start, our first question is: how dare a machine *per se* be considered 'better' than a human, especially in the complex matters entailing human justice?[3] As machine learning techniques are improved, artificial intelligence (AI) systems being used to assist human decision-makers in almost all fields.[4] However, attention must be focused on two particularly relevant profiles, which will form the two guidelines of this work: the first profile concerns the relationship between the use of AI in trials and the protection of personal data as referred to in the GDPR. In fact, predictive justice is a kind of justice foreseen by algorithms that carry out calculations starting from large masses of data (*big data*), to find recurrences in order to forecast outcomes and distinguish systems of evidence.[5]

The second focus, strictly connected to the first one, relates to the use of constitutional principles to give reasons for sentences, in compliance with the more general principle of the human in command, inspiring Art 22 GDPR (which restricts the automated decision, with limited exceptions)[6] and the Artificial Intelligence Act.[7] From the European Proposal of Regulation, the paper will highlight, in particular, the reasoning or motivation behind judicial civil sentences. In other words, this paper will deepen the considerable methodological expedients that are required to respect some of the principles of the Italian Constitution while using

[3] E. Lance, 'When AI Judges Our Human Judges And The Judgment Of The Courts', available at https://tinyurl.com/4dfvu68r (last visited 30 September 2024).

[4] S. Greenstein, 'Preserving the rule of law in the era of artificial intelligence' 30 *Artificial Intelligence and Law*, 291 (2022). 'A challenge for the future will be how to reap the benefits of AI for society while at the same time protecting society from its harms, essentially promoting innovation while at the same time balancing it against the interests of society. A challenge will be to determine which values to balance technology against. In this regard, it is argued that the values enshrined in the rule of law operate as a good starting point in determining the fabric of any society. Herein lies the value of protecting the rule of law from technologies incorporating AI'.

[5] See A. Guerra and F. Parisi, 'Investing in Private Evidence: The Effect of Adversarial Discovery' 14 *The Journal of Legal Analysis*, 2 (2022). 'Technological progress has reduced the cost of evidence technology, facilitating access to a wide range of information in court proceedings. Notwithstanding some resistance to the use of private evidence technologies and the legal challenges raised against the admissibility of the data collected in court proceedings, European legal systems have revised and extended the application of some of their evidence rules, leveraging on the opportunities offered by these technological transformations'. O. Pollicino, *Judicial Protection of Fundamental Rights Online: A road Towards Digital Constitutionalism?* (Oxford: Hart, 2021).

[6] In particular, see M. Kaminski, 'The Right to explanation' 34 *Berkeley Technology Law Journal*, 189 (2019); S. Wachter et al, 'Why a Right to Explanation of Automated Decision Making Does not Exist in the General Data Protection Regulation' 7 *International Data Privacy Law*, 76 (2017); B. Goodman and S. Flaxman, 'European Union Regulations on Algorithmic Decision Making and Right to explanation' 38 *AI Magazine*, 50 (2017).

[7] Proposal Regulation of the European Parliament and of the Council. Laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and Amending certain Union Legislative acts [2021], available at https://tinyurl.com/cjsvv55c (last visited 30 September 2024). European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, 2020/65/EC of 19 February 2020, available at commission.europa.eu.

AI (in the scope of upholding general legal principles in civil lawsuits), so that due process remains under human control.[8]

Many scholars wonder: how might machine learning improve judicial decision-making, or the sentencing process in general?[9] Proposals to incorporate AI into the sentencing process, range from modest to ambitious, from merely supporting judges, to replacing them entirely.

The length of the legal process timeline and the need for legal certainty, speed, cost reduction and quality decision-making have favored the use of 'prediction technology' and 'Predictive Justice': a system that allows for a prediction of the possible outcome of a dispute on the basis of the previous solutions given to analogous or similar cases and through the analysis of the data entered into the system by an algorithm.[10] In other words, it is a way of applying the law by exploiting AI and to determine, by means of the application of quantitative techniques (AI algorithms), the probabilities of each possible outcome of a dispute. The aim is to predict judicial decisions using algorithms 'trained' to analyze databases containing precedents and other information useful for increasing the degree of legal certainty and the quality of decisions, as well as solving other problems of justice such as long trial timelines.[11]

Further, as is known, several projects for the use of AI in the field of civil jurisdiction are already active throughout the world.[12] Even in Italy, 'predictive

[8] Human contribution does not always ensure greater certainty in decisions. For instance, a jury design is a critical element of criminal adjudication. Valid/important studies - F. Parisi et al, 'Accuracy of Verdicts under Different Jury Sizes and Voting Rules' 28 *Supreme Court Economic Review* (2020) - show that the use of either large non-unanimous juries or small unanimous juries are alternative ways to maximize the accuracy of verdicts while preserving the functionality of juries. Perhaps, AI systems through the elimination of the unanimity requirement in the presence of large juries can help appraise US Supreme Court decisions to improve fairness.

[9] J.V. Ryberg and J. Roberts, *Sentencing and Artificial Intelligence; Studies in Penal Theory and Philosophy* (New York: Oxford University Press, 2021).

[10] Think of a software like *Prometeia*, which allowed the Superior Court of Justice of Buenos Aires to resolve one thousand (repetitive) cases within seven days (instead of eighty three) with a success rate (parameterized to the solutions then actually adopted by the magistrates) of ninety six percent of cases. *Prometeia* was also the subject of experimentation at the Paris State Council. See G. Pasceri, *La predittività delle decisioni* (Milano: Giuffrè, 2022).

[11] In 2017, the English platform *Case Crunch* conducted the first competition between AI and Lawyers: AI won with an accuracy of eighty six point six percent against sixty two point three percent of lawyers on intellectual property cases discussed before the Financial Ombudsman Service. With an algorithm used in 2017 by the University of Sheffield, an experiment was conducted on five hundred eighty six judicial cases decided by the European Court of Human Rights in the field of due process, privacy and inhumane treatment.

[12] The following are a few already active projects which use AI in the field of civil jurisdiction: in Estonia the predictive justice program will be applied to all small claims (with a value not exceeding seven thousand euros), AI will formulate a decision on the basis of documents and information introduced by the parties and this decision can be challenged before a human judge (E. Niiler, 'Can AI be a fair Judge in Court? Estonia think so' *Wired*, available at https://tinyurl.com/4kjmvf9p (last visited 30 September 2024). In France, the project called *Datajust* aims to carry out an automated processing of data relating to the liquidation of personal damages, in which the Conseil National des Barreaux fears the infringement of fundamental rights on personal data (G. De Pasquale, 'La giustizia predittiva in Francia: il trattamento Datajust' *Judicium*, available at

justice' projects represent initiatives undertaken individually by certain judicial offices, often in collaboration with universities.[13] The purpose of these type of projects is therefore to provide users with elements that allow the possible outcome of a judgment to be predicted with variable margins of certainty, also discouraging cases of rash disputes and encouraging parties who have no chance of success at the judiciary level to follow other paths such as conciliatory ones.[14]

What are the main questions?

The use of AI tools in proceedings and the relationship between the exercise of the judicial function and AI raises several questions in the legal field.[15] In particular, in the face of an undeniable economic utility and efficiency, with a considerable reduction in the timelines and costs of justice, these technologies tend to collide with numerous issues[16] including: the autonomy and independence of the judge to the ancillary or decision-making role of the machine and the liability regime and its compatibility with AI tools and traditional institutions (such as the Italian Court of Appeal and the Court of Appeal in Cassation).

II. Data Protection in the Field of Predictive Justice

In relation to the first question, by its nature, AI collects a vast amount of data.

https://tinyurl.com/33tumxcx (last visited 30 September 2024).

[13] I intend to refer, citing only a few examples, to the Courts of Appeal of Brescia, Venice, Bari and Genoa. At the moment, it is only a question of a use of algorithms intended as a support to the activity of the judges, ie, without leading to entrusting decisive decision-making tasks to the software in the context of a judgment as so happened in the famous Loomis Case. In particular, for the purposes of our reflection, the project of predictability of the decisions of the Court of Appeal of Bari stands out, which focuses attention on the 'motivation' of the sentences, trying to adapt it to the legal paradigms and to simplify it in the case of serial issues. The case concerned an American citizen who in Wisconsin was given a sentence determined on the basis of the score assigned by AI. It involved a man accused of driving a used car during a shooting and not stopping at a police checkpoint. The judge, in establishing the penalty, had applied a particularly severe penalty of six years imprisonment using the results of an algorithm called Compas to quantify it *in peius*. The predictive software worked by analyzing the answers given to a questionnaire of one hundred thirty seven questions concerning age, work, social and relationship life, level of education, drug use, personal opinions and criminal history of the accused, also managing to determine the risk of recidivism. In the present case, Loomis had in fact been classified as a high-risk subject and for this reason he had been convicted not only for what he had done, but also for what he could have done in the future based on the result of a questionnaire elaborated on by the algorithm.

[14] See M. Libertini et al, 'Giustizia predittiva' n 2 above, 515; C. Castelli and D. Piana, *Giusto processo e intelligenza artificiale* (Sant'Arcangelo di Romagna: Maggioli, 2019); C. Giannacari, 'Il processo civile nell'era digitale: spunti di diritto comparato', in G. Alpa ed, *Diritto e intelligenza artificiale* (Pisa: Pacini, 2020), 623 ss; E. Katsh and O. Rabinovich Einy, *Digital Justice, Technology and the Internet of Disputes* (Oxford: Oxford University Press, 2017); G. Zaccaria, 'Figure del giudicare: calcolabilità, precedenti, decisione robotica'*Rivista di diritto civile*, 277 (2020); E. Battelli, 'Giustizia predittiva, decisione robotica e ruolo del giudice' *Giustizia civile*, 281 (2020).

[15] See the contributions in A. Carleo, *La decisione robotica* (Bologna: il Mulino, 2019).

[16] G. Di Vita, 'Production of Laws and Delay in Court Decisions' 30 *International Review of Law and Economics*, 276 (2010).

This 'silent' collection of data through the IOT (Internet of Things), the automated processing of large amounts of data through big data analytics techniques and its storage on cloud, are only some aspects of the impact of the use of AI on the protection of personal data. Given the close connection between data and algorithmic technologies, the link between the recent Proposal for a European Regulation on AI (Artificial Intelligence Act) and the General Data Protection Regulation (GDPR) is of particular importance.[17]

More generally, the use of AI (even in proceedings) seems to conflict with the general principles of the GDPR.[18] Apart from the problem of the integrity and completeness of the introduced data (such as procedural elements and jurisprudential precedents), the principle of transparency is especially jeopardized due to the protection offered by legal systems to algorithms. The principles of purpose limitation and minimization conflict with the possible re-use of personal data for different purposes by automated systems. The principle of minimization, then, also conflicts with the need to increase the amount of data to correlatively increase the degree of accuracy and reliability of the decision-making process. Finally, the principle of accountability requires the identification of a data controller. This identification is not easy in the case of predictive justice, with a consequent slowdown in innovation and a negative impact on the safeguard of the right to data protection.

On the other hand, the use of AI in justice, instead, makes it easy to obtain information on disputes submitted to the judicial authorities on the names of the parties, the professionals involved and the judges who ruled on them. This results in an intrusion into the sphere of people's private lives. Because of the need to guarantee people the control and protection of their personal data, a trend is developing that leans towards the so-called 'anonymization' of judgments and judicial measures, ie the obscuring of data that enable the identification of the persons mentioned.[19]

Is this tendency compatible with the principle of publicity of the process?

[17] In this regard, see R. Gellert, *The Risk Based Approach to Data Protection* (Oxford: Oxford University Press, 2020), 2; C. Casonato and B. Marchetti, 'Prime osservazioni sulla proposta di regolamento dell'Unione Europea in materia di intelligenza artificiale' *BioLaw Journal*, 415 (2021); G. Finocchiaro, 'Intelligenza artificiale e protezione dei dati personali' *Giurisprudenza italiana*, 1670, 1671 (2019); U. Pagallo and W. Barfield, *Advanced Introduction to Law and Artificial Intelligence* (Cheltenham-Northampton: Edward Elgar Publishing, 2021), 14; T. Wischmeyer and T. Rademacher, *Regulating Artificial Intelligence* (Cham: Springer International Publishing, 2020).

[18] F. Pizzetti, *Intelligenza artificiale, protezione dei dati personali e regolazione* (Torino: Giappichelli, 2018), 60; T. Zarsky, 'Incompatible: The GDPR in the Age of Big Data' 47 *Seton Hall Law Review*, 995 (2017).

[19] In this regard, see M. Van Opijnen et al, 'Online Publication of Court Decisions in the EU. Report of the Policy Group of the Project Building on the European Case Law Identifier', available at *bo-ecli.eu*; E. Groudytè and S. Milciuvienê, 'Anonymization of Court Decisions in the EU: Actual and Comparative Issues' 18 *Law Review*, 60 (2018); C. Iannone and E. Salemme, 'L'anonimizzazione delle decisioni giudiziarie della Corte di giustizia e dei giudici degli Stati membri dell'Unione europea', in A. Ciriello and G. Grasso eds, *Il trattamento dei dati personali in ambito giudiziario* (Roma: Scuola Superiore della Magistratura, 2021), 103.

How should the balance be struck between the protection of the data of the persons involved (ie 'data subjects') and the principle of transparency of justice?[20]

To answer these questions, it is necessary to start from Art 6 of the European Convention on Human Rights (ECHR), which, as well as outlining requirements of a fair trial, establishes that 'the sentence must be rendered publicly', unless the opposite is required by 'morality, public order, national security (...) interests of minors, protection of the privacy of the parties involved'.

Not even the GDPR to date has addressed the issue of the anonymization of judgments and provisions of judicial authorities. However, with specific reference to the judicial function, in Art 9, it excludes from the prohibition of processing 'sensitive' or 'particular' personal data (such as racial origin, political opinions, religious beliefs, genetic and biomedical data) when 'the processing is necessary to ascertain, exercise or defend a right in court or whenever the courts exercise their functions'.

In the absence of common rules on the anonymization of judgments, substantial differences emerge across the European Union. For example, the General Court of the European Union and the European Court of Human Rights provide for the blacking out of personal data only upon request by a party and for 'legitimate reasons'. The principle, therefore, is that of the complete publication of judgments and sentences. For the European Court of Justice, however, the rule of anonymization applies. Italy is an exception to this trend. Its legal system (Art 52 of the Privacy Code) identifies some limited cases in which, due to the delicacy of the situation (such as persons offended by sexual violence), or the characteristics of the person involved (for example, minors), the anonymization of judicial judgments is mandatory. In all other cases, it is up to the individual judicial authorities to balance the opposing needs and decide whether or not to order the anonymization of a judgment. When considering this balance, due weight should be given to the principle of transparency of justice. The same Constitutional Court has underlined how the principle of publicity and transparency of the process 'guarantees justice and removes any suspicion of bias. Advertising is the essence of justice (because) it puts the judge himself, as he judges, under judgment'.[21]

[20] E. Gruodyte, 'Anonymization of Court Decisions: Are Restrictions on the Right to Information in Accordance with The Law?' 9 *Baltic Journal of Law&Politics*, 150 (2016); G. Grasso, 'Il trattamento dei dati di carattere personale e la riproduzione dei provvedimenti giudiziari' *Il Foro Italiano*, 349 (2018); E. Concilio, 'Atti giudiziari e tutela dei dati personali (TAR Lazio no 579/2021)' *Questione Giustizia*, available at https://tinyurl.com/myczzmas (last visited 30 September 2024); F. D'Alessandri, 'La privacy delle decisioni giudiziarie pubblicate sul sito internet istituzionale della Giustizia Amministrativa', available at https://tinyurl.com/54h3yh8h (last visited 30 September 2024): in his opinion, a generalized anonymization through the use of initials or the elimination of references to natural persons would be sufficient.

[21] J. Bentham, 'Principles of Judicial Procedure', in J. Bowring ed, *The work of Jeremy Bentham* (Edimburgh: William Tait, 1838-1843).

III. Automated Proceedings and Constitutional Limits

In this context of 'due process', the constitutional obligation to provide reasons judgments serves not only to guarantee the exercise of the right of action and defense of the parties in the judgment, but also to allow for a check on the work of the judge. AI certainly has many advantages in the field of predictive justice.[22] It 'knows' all the jurisprudence, it is always able to examine all the questions and all the arguments of the parties, and it can decide but not give reasons. However, deciding is analogous to providing reasons. Reasoning is the founding element of traditional jurisdiction and represents the biggest critical point of the use of AI in proceedings.

In a very uncertain and jagged European and international regulatory context, there is more than one reason why a machine-learned sentence represents an unconvincing alternative to judicial decision-making. This section of the paper explains and focuses on these reasons. The topic is very broad. For this reason, specific attention will be paid to the coordination between constitutional principles and the indications of the European Proposal for regulation of AI.[23] From the European Proposal of Regulation, the paper will try to highlight, in particular, the reasoning or motivation behind judicial civil judgments.

This important, and new law-text has the intention of harmonizing the rules on AI (Artificial Intelligence Act).[24] It is in the European Union's interest to preserve its technological leadership and to ensure that Europeans can benefit from new technologies developed and functioning according to EU values, fundamental rights and principles.[25] In particular, such action is especially needed in high-impact sectors, including in relation to climate change, environment and health, the public sector, and the administration of justice. The European Parliament

[22] The digitalization systems for access to justice are very advanced. Virtuous examples are now proven practice throughout Europe. On this practice see C. Giannaccari, 'Diritto e intelligenza artificiale', in G. Alpa ed, *Diritto e intelligenza artificiale* n 14 above, 632.

[23] Proposal Regulation of the European Parliament and of the Council. Laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and Amending certain Union Legislative acts [2021]. Available at https://tinyurl.com/r6t6fdkv (last visited 30 September 2024). European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, 2020/65/EC of 19 February 2020, available at commission.europa.eu.

[24] AI is a fast-evolving family of technologies that can bring a wide array of economic and societal benefits across the entire spectrum of industries and social activities. AI has great potential in all areas of our lives, but it also presents risks for fundamental rights and the rule of law. The European Union is trying to create a balanced regulatory framework based on the pros and cons of AI. On 21 April 2021, the EU published a comprehensive proposal for AI regulation, which should protect and promote European rights and values, without impeding the technological, industrial, and commercial development of AI.

[25] The Explanatory Memorandum states: 'Reasons for and objectives of the proposal: by improving prediction, optimising operations and resource allocation, and personalising service delivery, the use of artificial intelligence can support socially and environmentally beneficial outcomes and provide key competitive advantages to companies and the European economy'.

(EP) has also undertaken a considerable amount of work in the area of AI.[26] The EP Resolution on a Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies specifically recommends to the European Commission to propose legislative action to harness the opportunities and benefits of AI, but also to ensure the protection of ethical principles. The resolution includes a text of the legislative proposal for a regulation on ethical principles for the development, deployment and use of AI, robotics and related technologies.[27]

The specific objectives of the Proposal are to: a) ensure that AI systems placed on the Union market and subsequently used are safe and respect existing laws on fundamental rights and Union values; b) ensure legal certainty to facilitate investment and innovation in AI; c) enhance governance and the effective enforcement of existing laws on the fundamental rights and safety requirements applicable to AI systems and d) facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.[28] An extremely brief summary and without any claim to exhaustiveness, considers that it is useful to remember that in the proposed regulation, the following are distinguished, according to pyramid logic: a) prohibited AI practices, as they expose us to an unacceptable risk; b) high-risk AI systems, permitted on the European market subject to compliance with

[26] In October 2020, it adopted a number of resolutions related to AI, including on ethics (European Parliament resolution 2020/2012/INL of 20 October 2020 on a framework of ethical aspects of artificial intelligence, robotics and related technologies [2020]); liability (European Parliament resolution 2020/2015/INI of 20 October 2020 on a civil liability regime for artificial intelligence, and copyright [2020]; European Parliament resolution 2020/2015/INI of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies [2020]; European Parliament Draft Report 2020/2016/INI of 13 July 2021 on Artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters, [2020]). All the documents are available at eur-lex.europa.eu. In 2021, those were followed by resolutions on AI in criminal matters (European Parliament Draft Report 2020/2017/INI of 19 May 2021 on Artificial intelligence in education, culture and the audiovisual sector [2020]). In that regard, the Commission has adopted the Digital Education Action Plan 2021-2027: Resetting Education and Training for the Digital Age, which foresees the development of ethical guidelines in AI and Data usage in education – European Commission 2020/624/EC of 30 September 2020 available at eur-lex.europa.eu.

[27] These indications come out of a long consultation and elaboration process that preceded the drafting of the AI Act. On this, it its necessary to mention the European Commission for the Efficiency of Justice that teaches when Artificial Intelligence is used 'it is essential to ensure that the AI tools do not undermine the guarantees of the right of access to a judge and the right to a fair trial (equality of arms and respect for the adversarial process)'. Also, the High-Level Expert Group on Artificial Intelligence, Policy and Investment Recommendations for Trustworthy AI were given seven requirements for trustworthy AI: (a) human intervention and surveillance; (b) technical robustness and safety; (c) data privacy and governance; (d) transparency; (e) diversity, non-discrimination and equity; (f) social and environmental well-being and (g) accountability.

[28] § 1.1. To achieve those objectives, this proposal presents a 'balanced and proportionate horizontal regulatory approach to AI that is limited to the minimum necessary requirements to address the risks and problems linked to AI, without unduly constraining or hindering technological development or otherwise disproportionately increasing the cost of placing AI solutions on the market. The proposal sets a robust and flexible legal framework. At the same time, the legal framework includes flexible mechanisms that enable it to be dynamically adapted as the technology evolves and new concerning situations emerge'.

certain mandatory requirements and an *ex ante* conformity assessment by suppliers and c) non-high-risk AI systems, for which suppliers are encouraged to adopt codes of conduct aimed at encouraging the voluntary application of the requirements for high-risk systems.

From the AI Act, it is worth citing point 8 of Annex III. Here the high-risk AI Systems list and its definitions can be found specifically: 'AI systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts'.

It is important to stress an initial focal point: the concept of *assisting rather than substituting the judge* is mentioned. The same idea can be found in the AI Act, at Art 40, where a high-risk system is classified as

> 'Administration of justice and democratic processes, considering their potentially significant impact on democracy, rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial. In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts'.

Another fundamental indication is at Art 28:

> 'AI systems could produce adverse outcomes to health and safety of persons, in particular right to an effective remedy and to a fair trial, right to be defended and the presumption of innocence, right to good administration'.

It is necessary to mention GDPR once again. Here Art 22 sets out the rules concerning automated individual decision-making. It states that

> 'The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'.

These summary points show only the tip of an iceberg that sails in a boundless sea of problems connected to the administration of justice.

As is well known, due process of law is strictly connected with cross-examination and the reasoning behind a decision. So, the reasons why a machine-learned sentence represents an unconvincing alternative to judicial decision-making are numerous. It is a fundamental principle of the Rule of Law that legal decisions must be justified. Explicit legal norms for this justification can seldom be found in most legal systems, unlike in Italy. According to the Italian Constitution, to guarantee the right to defense (Art 24), judicial decisions, must be justified (Art 111) and proceedings must respect the rules of an effective cross-examination (Art 111). That is to say that sentencing must be justified in order to make the logical-argumentative reasoning followed by the judges after cross-examination, transparent.

Above all, it is crucial to consider that human legal reasoning is not a purely logical process. Some legal questions might be solvable using relatively logical *textbook rules*. However, judges will often be confronted with *hard cases* where the existing rules are insufficient.[29] These cases require the interpretation of a rule or the creation of new rules by referring to *policy goals* or the requirements of justice and equity.[30] As is well known, a judge not only applies legal rules but also resolves interpretation problems and justifies his doing so in a reasoned decision. This task requires fundamental *human* qualities such as common sense as well as moral, social and cultural awareness.[31] Authoritative scholars have pointed out that many limits, both internal and external, to the decision-making mechanism can be ascribed to structural factors specific to the judicial decision, so exist even in the case of a decision taken by a human-judge.[31bis] The principal factor is the own nature of the so-called 'judgement of fact' or the 'judgement of law'. Furthermore, the loss of a secure hierarchy of law-sources, in our multilevel system, is not in line with the functioning of the decision algorithm which instead operates according to probabilistic and statistical criteria.[31ter]

One of the more important problems in the study of legal argumentation is the question regarding 'which standards of soundness the argumentation should meet'.[32] The judge has to explain why the legal rules are applicable to the concrete case. How can the interpretation of a legal rule be acceptably justified? What, in the context of legal justification, is the relation between legal rules, legal principles and general moral norms and values?[33] When judges resolve an interpretation problem

[29] J. Ryberg and J.V. Roberts, *Sentencing and Artificial Intelligence. Studies in Penal Theory and Philosophy* (Oxford: Oxford University Press), 2022.

[30] T.J. Miceli, 'Sentencing Guidelines, Judicial Discretion, And Social Values' *Economics Working Papers* available at https://tinyurl.com/3kvy8afs (last visited 30 September 2024), studies judicial discretion in criminal sentencing. There are opposing views regarding its function. The Papers affirm how the key question concerns the optimal interaction between the stringency of legislative guidelines and the degree of judicial discretion within this sequential process, given that legislatures and judges may hold differing views regarding the social function of punishment.

[31] Scholars from various backgrounds have attempted to explain the structural features of legal decision-making and justification from different points of view: M. Bagaric and G. Wolf, 'Sentencing by Computer: Enhancing Sentencing Transparency and Predictability and (Possibly) Bridging the Gap between Sentencing Knowledge and Practice' 25 *George Mason Law Review*, 653-709 (2008); C. Vincent, 'Predicting Proportionality: The Case for Algorithmic Sentencing' 37 *Criminal Justice Ethics*, 238-261 (2018).

[31bis] A. Carratta, 'Decisione robotica e valori del processo' *Rivista di diritto processuale*, 498, 450 (2020).

[31ter] A. Pajno et al, 'AI: profili giuridici. Intelligenza Artificiale: criticità emergenti e sfide per il giurista' *BioLaw Journal*, 228 (2019).

[32] J. Nieva Fenol, *Intelligenza artificiale e processo* (Torino: Giappichelli, 2019), 105; E.T. Feteris and H. Kloosterhuis, 'Law and Argumentation Theory: Theoretical Approaches to Legal Justification', available at https://tinyurl.com/nu6m9m29 (last visited 30 September 2024).

[33] In the past thirty years, the study of law and argumentation has become an important interdisciplinary discipline. It draws its data, assumptions and methods from legal theory, legal philosophy, logic, argumentation theory, rhetoric, linguistics, literary theory, philosophy, sociology, and artificial intelligence; E.T. Feteris and H. Kloosterhuis, n 32 above.

in deciding a case, they can choose different types of *interpretative arguments* to justify their decision. For instance, they may choose different normative sources which have previously been screened and selected among the relevant real-life cases. These arguments must be recognizable in the justification of the legal decision.

So, a relevant technological difficulty of programing a *computer judge* stems from the nature of judicial reasoning, and the challenges of entering the appropriate data relevant to the sentencing decision. The data should be entered on a case-by-case basis as a result of statements of principle, the reaction between actions and exceptions, which the plaintiff and the defendant express during proceedings. It should not be forgotten that the principle barrier to creating a functioning sentencing algorithm lies at the input stage. The complexities of inputting appropriate information have been overlooked by AI advocates.[34] For these reasons, some would argue the AI aspects need to be rethought and that it should not be presumed that AI should be working on its own (ie, fully autonomously).

For these reasons, in this moment in time my recommendation is that AI should only supplement judicial decision-making. So how can AI be employed in a way that supports judicial decision-making? It can be done by speeding up our legal process, promoting greater access to justice and implementing its efficiency. AI could readily be used to prepare guidelines[35] and document templates (of Court applications, of judge's rulings, lease agreements, etc) as well as in finding search options (these tools could link various sources: eg, constitutions and conventions, international laws,[36]

[34] Regardless of the issues deriving from the use of AI, important studies argue how the amount of information possessed can change the decision on whether to litigate rather than settle a dispute. In areas where the law requires information on the defendant's level of compliance with a legal standard and where defendants have more information on this than plaintiffs do, win rates will be low (that is, below 50 percent). If neither party has an informational advantage, a 50 percent win rate should be observed K.N. Hylton, 'Asymmetric Information and The Selection of Disputes For Litigation' 22 *The Journal of Legal Studies*, 187-210 (1993).

[35] T.J. Miceli, 'Sentencing Guidelines and Judicial Discretion: Balancing Deterrence and Retribution', in Id, *The Paradox of Punishment* (London: Palgrave Macmillan, 2019). This chapter examines the interplay between legislatures, which enact sentencing guidelines *ex ante*, and judges (courts) that implement actual sentences *ex post*, subject to legislative guideline.

[36] G. Di Vita, 'Production of Laws' n 16 above, 276.

all case-law enhancement[37] and legal theory).[38]

Through some guidelines, AI would also make other contributions to more consistent and transparent sentencing and can better perform the following task: it could empirically verify the weight carried by different factors in previous sentencing decisions and identify any over-arching misapplications of the guidelines. Specifically, it could mitigate human cognitive biases and discrimination in sentencing. However, it is precisely with regard to the 'development risk' that the AI Act is completely inadequate, even in other regulatory sectors.[38bis] This approach has already guided various sentencing information systems developed in recent decades in some countries.[39] The judge consults a computer-derived recommendation, much as Courts in jurisdictions consult guidelines for sentence recommendations (or binding legal precedent). The use of data science and AI techniques on Court activity data can help improve the efficiency of justice by making it possible, for example, to carry out quantitative and qualitative evaluations and to make

[37] With an emergency resolution of 30 March 2023, the Italian Guarantor for the protection of personal data temporarily limited the use of ChatGPT software in Italy in the absence of the information provided to users and all interested parties whose data is collected by the supplier, the company OpenAI. Above all, it was due to the absence of a legal basis that justifies the massive collection and storage of personal data, for the purpose of *training* the algorithms underlying the functioning of the platform. The same provision adds that, based on the checks already carried out up to that point, the information provided by ChatGPT does not always correspond to the real data, thus resulting in inaccurate processing of personal data. Following an initial operational response from the service provider, the Guarantor, with a subsequent decision on 11 April 2023, suspended the effectiveness of the precautionary order, but issued further severe operational instructions aimed at data processing, on the compliance with which constant investigation was carried out. Even in this case, however, it is clear that the sanction to the artificial AI system does not enter into the merits of the possibility of using it but it stops at the (decisive) phase of the collection of information and personal data then used to train the program. Also, in this case, therefore, nothing in itself prevents the use of an artificial intelligence system, as long as this guarantees the transparency and traceability of the data used.

[38] This is the reasoned order (order and decision) of the Court of the Southern District of New York of the USA of 22 June 2023, *Mata* v *Avianca* 1461 US (2022), available at https://tinyurl.com/a7ycb6pc (last visited 30 September 2024). It is the imposition of a pecuniary sanction (of USD 5000) on two lawyers of the plaintiff in a civil case for compensation for damages brought by a passenger against an airline. In support of the arguments in favor of the customer, they had made precise and extensive reference to jurisprudential precedents, completely invented and therefore non-existent and furthermore articulated in a poor manner, by means of an AI system known as ChatGPT. They had also, at least initially, solemnly insisted on the genuineness of their submissions. The relevant jurisdictional provision, however, does not sanction - in and of itself taken into consideration - the use of an AI system in the preparation of the party's judicial action, but only its clumsy use, ie without the expression of a final supervisory role on the reliability of the references indicated and on the formal and substantial technicality of the individual arguments.

[38bis] M. Rabbitti, 'Intelligenza artificiale e finanza. La responsabilità civile tra rischio e colpa' *Rivista trimestrale di diritto dell'economia*, 297, 312 (2021). In her work, the A. is assigned the solidity of traditional liability models. In the face of the challenges of technological evolution, the A. points out that the absence of shared liability rules in Europe does not contribute to the certainty of the regulatory framework, nor does it favor the creation of trust in new technologies which is prerequisite for a physiological evolution of law.

[39] In Austria, AI tools are used in courts for rapid reading, classification and attribution of documents to the registry sections and also to monitor the activity of the courts.

projections.[40] Key performance indicators could be drawn up on this basis and reduce the costs and duration of litigation. Above all, these tools would significantly reduce the number of civil cases, being able to predict the chances of success.

Finally, it is worth mentioning that AI could increasingly be used as a first stage of a judicial decision or as an *advisory sentence system*.[41] In these hypothesized cases, a human judge would then review the AI *decision* and decide whether to let it stand or override it.[42]

IV. Conclusion

Modern technologies are increasingly being used within society, AI being a prime example. As machine learning techniques are improved, AI systems are increasingly being employed to assist human decision-makers in almost all fields. It should be anticipated that as these technologies become better at assisting with decisions, more control and responsibility will be transferred to them. It is therefore important that heed should be taken to the fact that these technologies are challenging the ideals associated with the rule of law as a concept of traditional law. In addressing the harms associated with AI in relation to the rule of law, a common denominator that stands out is the manner in which AI potentially inhibits the flourishing of humans.[43] While this may traditionally not be the first association in relation to the rule of law as a concept, it is nevertheless important to address, as human agency can be argued to be a cornerstone of society. A challenge for the future will be how to reap the benefits of AI for society while at the same time protecting society from its harms, essentially promoting innovation while at the same time balancing it against the interests of society. The challenge will be to determine with which values to balance technology.

[40] It is recommended that legal professionals, especially judges, be involved in the implementation of these tools, in terms of taking ownership of them and of analyzing the results in conjunction with factors relating to the specific features of the court in question or the quality of justice (for example, the need to preserve access to justice).

[41] Hong Kong has recently approved (2020) a law for the rapid resolution by AI of disputes related to the pandemic, with a value not exceeding 50000 euros and with at least one of the parties being a citizen of Hong Kong. Access to a trial is optional and consists of three phases: negotiation, mediation and arbitration. The role of the human professional continues to be central and the gain in terms of efficiency of the judicial system seems remarkable. In the United Kingdom, *Online Courts* have been designed to resolve cases worth less than £25000. The European e-Justice Action Plan 2019-2023 includes several projects aimed at facilitating the online circulation of judicial data in the EU.

[42] For instance, in China, the Beijing Internet Court has set up around a hundred robots with the task not of pronouncing sentences, but of assisting judges in the decision-making process. This virtual judge has a female appearance and voice and assists the human judge in carrying out the most repetitive tasks such as receiving appeals, and jurisprudential analysis of cases with similar outcomes. This is to relieve the magistrates of the simplest and most repetitive activities, speed up procedural times, and also achieve predictive justice.

[43] On the *flourishing of humans* concept, see in particular S. Greenstein, n 4 above, 316.

In this field, considering the wide scope of the applicability of the GDPR, it is not inconceivable that the GDPR will be relevant in many circumstances where AI is used even in the justice system. In general, the impact of AI on the rights and freedoms of data subjects raises concerns in several respects and the legal scholar has the task of investigating critical issues relating to data protection and resolving conflicts with the use of AI in the jurisdiction, in order to guide the legislators in the challenges they are called to face. With particular regard to the anonymization of sentences, Italy is an exception compared to other European countries in making in some cases anonymization mandatory. In other cases, it is up to the judges to balance the right to protection of personal data with freedom of information. In order to harmonize regulation in this regard, it would be desirable for the legislator to intervene on the matter, introducing generalized anonymization through the use of initials only or the elimination of references to natural persons. In this way, an adequate level of protection will be guaranteed, on the one hand, and transparency of Court decisions, on the other, in order to combine the publicity of the process. This allows due control over a power exercised in the name of the people and the right to data protection not only of the parties, but also of third parties (think, for example, of witnesses). The publication of personal data in a sentence, especially online, provides an important wealth of information and is the greatest source of risk of indexing, decontextualized reproduction, alteration, even manipulation, in no way comparable to paper publications and Art 52 GDPR. This Article advocates that the following two measures are insufficient: that an interested party may request, for legitimate reasons, an annotation be placed on the original copy of a judgment aimed at precluding, in the event of the reproduction of the judgment in any form, the indication of their personal details and of other identifying data reported in the judgment (§ 1); that a judicial authority may also order *ex* officio an annotation, 'to protect the rights or dignity of the interested parties' (§ 2). Rather, the relationship between rule and exception should be reversed: personal data, in judgments, should normally be anonymized, unless particular reasons (public health, public figures involved and the like) require its transparency.

As noted above, the aim of ensuring greater efficiency through the calculability and predictability of decisions proposed by this approach would be theoretically compatible with the very aim of the judicial decision. The fear is that decisions will be based on the outcome of an algorithm, putting at risk the principles of impartiality and free conviction of the judge. Whether this approach is fair cannot be evaluated exclusively in terms of efficiency and duration, but, instead, on the quality of the decision, respect for people and their rights, the evaluation of the concrete case in compliance with constitutional principles and the essential value of fairness.[44]

[44] We must not forget that evolutionary interpretation and the essence of the jurist's work, does not belong to AI systems today. They learn from the past and tend to repeat a pattern, which happened in the cases in the United States that penalized access to parole for people of color, reproducing biases. Therefore, in the activity of innovative interpretation, there is currently no space for AI systems.

The uncertain and jagged regulatory context suggests some modifications and adaptations must be made to adapt the Italian Civil Lawsuit Code to the use of certain forms of AI. For instance, no intrinsic limit is imposed on the preparation of a judicial document under the current legislation. The Civil Law Code expressly provides, in the second sentence of Art 121 Code of Civil Procedure, that 'All the documents of the trial are drawn up in a clear and concise manner'; with provision taken up and specified for the individual documents of the trial (Art 163, no 4; Art 167; Art 281-*undecies*; Arts 342 and 434; Art 366, no 3, 4, 6; Arts 473-bis.12, 473-bis, 473-bis.17, 473-bis.32 Code of Civil Procedure). An interesting starting point to work on and integrate AI into the Italian trial may be found under Art 46 of the Italian Civil Procedural Code:[45] it provides that

> 'When they are drawn up in the form of an electronic document, they comply with the legislation, including regulations, concerning the drafting, signing, transmission and reception of electronic documents'.

The same rule also provides that failure to comply with the technical specifications on the form, the layout, the criteria and limits for drafting the document does not lead to invalidity, but can be assessed by the judge for the purposes of deciding on the costs of the trial. Further, above all, the Article concludes that the judge draws up the documents and provisions in compliance with the criteria set out in this Art.[46] So, the judge's task is not limited to the mere final decision of the case brought to their attention, but is also characterized by a series of further activities. A collaborative model that is based on a complementarity between man and machine and allows the human to maintain control over the algorithm is warranted.[47]

To reach this objective, the approach must not be that of a law that has to suffer or defend itself from the impact of AI, but rather that of a law that governs AI and regulates its use.[48] It does not appear that the European Regulation Proposal has

[45] Art 46 of the Civil Procedural Code (amended by Art 4, § 3, b, of decreto legislativo 10 October 2022 no 149) refers to a subsequent ministerial decree, to be issued after consulting the superior Council of the Judiciary and the National Forensic Council, to define: on the one hand, the schemes of the judicial documents with the structuring of the necessary fields for entering information into the trial registers; and on the other hand, the limits of the procedural documents, taking into account the type, value, complexity of the dispute, the number of parties and the nature of the interests involved.

[46] Possible further research developments should focus on legal instruments to ensure the observance of other fundamental constitutional principles of the process: context of discovering, contemporaneity of decisions with social evolution, correspondence of the Judge and judged, computer/human symmetry.

[47] This is because AI learns from itself and from the experience it acquires from time to time, but it does not have - or, at least, does not yet have - the creativity and capacity for intuition and abstraction typical of the human mind, so it would run the risk of embalming reality in a theoretical scheme preset *ab externo*.

[48] Interesting lessons by F. Parisi, *Sources of law and the production of legal rules: an economic perspective, Economic Analysis of Law: A European Perspective* (Cheltenham: Edward Elgar Publishing, 2012).

adopted this line of action but rather that of a defensive outlook. Unfortunately, it must be noted that, for the profiles considered here, there are no specific rules, but only disciplinary classificatory and definitional indications. It is enough to consider that, contrary to indicated by the most authoritative scholars, the European legislator, once again, does not give rules on the civil liability regime damages caused by AI.[49] Under this method, algorithms, even before having to respect the provisions of the Proposal for a Regulation, must be considered on a par with legal rules, ie, they must respect the general principles of the legal system in which they operate. The transparency of reasoning is the most important foundation of the right to defense.[50]

The goal is to use machine learning and algorithm systems, to guarantee a judicial provision with the following characteristics: conscientious creativity, transparency of reasoning and consistency with the local constitutional value system.

[49] M. Rabbitti, 'Intelligenza artificiale' n 38bis above, 307. It is highlighted that the relevance of human behavior is inverse proportional to the degree of autonomy of AI.

[50] E. Rulli, 'Giustizia predittiva, intelligenza artificiale e modelli probabilistici: chi ha paura degli algoritmi' *Analisi giuridica dell'economia*, 533 (2018).